IN THE IOWA DISTRICT COURT FOR POLK COUNTY

CINDY FREIBURGER, **Petitioner,** **vs.** **JOHN DEERE DUBUQUE WORKS OF DEERE & COMPANY,** **Respondent.**	**Case No. CVCV063437** **RULING ON PETITION FOR JUDICIAL REVIEW**

Petitioner, Cindy Freiburger's Petition for Judicial Review came before the Court on September 7, 2022. Petitioner was represented by Thomas Wertz. Respondent, John Deere Dubuque Works of Deere & Company, appeared through Arthur Gilloon. After hearing the parties' arguments and reviewing the court file, including the briefs filed by both parties and the Certified Administrative Record, the Court now enters the following ruling.

I. BACKGROUND FACTS AND PRIOR PROCEEDINGS.

Petitioner began working for Respondent in 2011. She suffered a work injury on April 1, 2015, while hoisting a heavy frame in the course of her work. The frame pinned Petitioner against a work table, injuring her left ankle and right leg. She was taken to Finley Hospital and treated by Stephen Pierotti, M.D. He assessed her as having a left ankle dislocation and a right distal tibia and fibula fracture, both closed injuries. Joint Exhibit (JE) 1, p. 1. On April 1, 2015, Dr. Pierotti performed a closed reduction and casting of the left dislocated ankle and an intramedullary (IM) rod of the right tibia and open reduction and internal fixation (ORIF) plating of the right distal fibula. *Id.* at 2. Petitioner was released from the hospital on April 4, 2015. She followed up with Dr. Pierotti for a time, began full weightbearing on both legs on June 10, 2015, and received physical

therapy as her injuries healed. *Id.* at 4. Dr. Pierotti saw Petitioner again on February 24, 2016. At that time, she was working six hours per day and allowed to do work activities as tolerated. JE 1, p. 5. As of April 27, 2016, Dr. Pierotti noted the pain in her legs was likely to be permanent. *Id.*

Petitioner has a long history of intermittent back problems. On July 13, 2016, she was evaluated by Christopher Palmer, M.D. due to progressive left-side back pain following her return to work from her leg injuries. At that time, she was assessed as having degenerative disc disease. JE 8. Petitioner saw Timothy Miller, M.D. on August 17, 2016, for intermittent left leg pain. Dr. Miller noted her gait was normal and he believed her problems would resolve. JE 2, pp. 1-2. On November 23, 2016, Petitioner saw Dr. Miller again noting some clicking of her hip and a "feeling of impeding doom, like something was wrong." Dr. Miller heard no clicking at the time of exam. She had a gluteal trigger point injection by Dr. Miller on January 26, 2017. *Id.* at pp. 4-8. She returned to Dr. Miller on February 15, 2017, and was found to be at maximum medical improvement (MMI) for her gluteal symptoms. *Id.* at 10-11. On April 14, 2017, Dr. Pierotti indicated Petitioner had reached MMI on both legs and opined she had no permanent impairment to either the left or right leg. JE 1, p. 7.

David Field, M.D., performed an independent medical evaluation (IME) on Petitioner. In a July 5, 2017 report, he opined that Petitioner had no permanent impairment on her left lower extremity, and a 5% permanent impairment on her right lower extremity. Resp. Ex. B, p. 4. On December 20, 2017, Petitioner was evaluated by Ludwig Gutmann, M.D. for occasional tingling in the feet and intermittent left buttock pain. He found the left hip pain was likely not related to her work injury but a separate issue,

however her tingling likely was so related. JE 9.

On January 24, 2019, Petitioner was evaluated by Don Damsteegt, Ph.D., for chronic worrying about a future injury. His diagnosis was "generalized anxiety disorder" and "R/O [rule out] symptoms of PTSD" (post-traumatic stress disorder). JE 3, p. 6. Petitioner returned to Dr. Pierotti on February 15, 2019. She indicated tenderness over the entirety of her right lower extremity. Dr. Pierotti recommended against removal of the hardware in her leg. His impairment rating was unchanged. JE 1, p. 7.

Petitioner saw Arnold Delbridge, M.D., on February 4, 2019, for a second IME, which he provided his conclusions in a March 13, 2019 report. He noted Petitioner complained of pain in the left buttock radiating to the knee, right leg numbness, and a burning sensation in her right leg. Pet. Ex. 1, pp. 1-4. Dr. Delbridge noted Petitioner returned to work after the injury initially four hours per day on light duty, then six hour per day on light duty, and about a year after the accident she was able to return to work eight hours per day on normal duty. She continued overtime restrictions. *Id.* at 3. Dr. Delbridge stated her main problem was pain in both legs, far worse on the right. *Id.* at 5. He also found "she walks with an uneven gait" because she has zero dorsiflexion on her right ankle and "as a result she takes a short step with her left lower extremity." *Id.* He opined she had limited range of motion of her left ankle, at most 10 degrees of dorsiflexion, and

> that is an impairment of 7% of the lower extremity. Converted to whole person impairment, that would be 2% whole person impairment. On the right said she has 0 degrees dorsiflexion and would have the same impairment. Her impairment, however, on that side would not be included, according to Table 17-2 in Guides to Evaluation of Permanent Impairment, fifth edition, page 526. Having a gait derangement precludes inclusion of such impairment. She has obvious gait derangement which is addressed on Table 17-5 on page 529 on Guides to Evaluation of Permanent Impairment. After my examination and review of her x-rays, my conclusion is that she qualifies under lower limb impairment due to gait derangement, as mild,

which is a. in the chart and as such as a 7% whole person impairment. *Id.* at 5-6.[1] Dr. Delbridge noted Petitioner's MMI date as June 1, 2018, after her treatment by Dr. Miller would have subsided. He went on to opine, "As far as permanency is concerned, she has a 7% body as a whole impairment as a result of her alternation in gait as discussed above. She has 7% impairment of her left lower extremity on the basis of lost ankle motion." *Id.* at 7.

In an April 18, 2019 note, Dr. Damsteegt indicated Petitioner's tendency to worry was greatly aggravated by her April 2015 work injury. JE 3, p. 9. He noted he did not diagnose her with PTSD, but that diagnosis needed to be ruled out with further assessment. *Id.* He stated he did not know if she met all diagnostic criteria for PTSD. *Id.* However, she had "symptoms of mistrust of others and blame of her herself, which likely have been exacerbated by the injury." *Id.* at pp. 9-10. On November 19, 2018, Petitioner filed a petitioner with the Iowa Workers' Compensation Commission seeking benefits based on injures to the body as a whole. In a letter dated July 3, 2019, Laura Rank, LMHC, indicated she believed Petitioner had PTSD and that it stemmed from her work injury. JE 4, p. 16. Petitioner was evaluated by Mark Mittauer, M.D., on August 29, 2019. He assessed her has having PTSD "chronic" and "insomnia with other medical comorbidity (pain)." *Id.* at 25.

Philip Chen, M.D., evaluated Petitioner on September 24, 2019. She was diagnosed as having a right saphenous nerve injury and told she could use a TENS

[1] Respondent attached Table 17-5 at page 529 of the Guides to Evaluation of Permanent Impairment, to its Judicial Review Brief. This page expressly states "the percentages given in Table 17-5 are for full-time gait derangements of persons who are dependent on assistive devises." Under the "severity"/"Mild" column on the Table, section "a.", the specific section referred to by Dr. Delbridge, states an individual with "documented moderate to advanced arthritic changes of hip, knee, or ankle" would be assessed as having a 7% whole person impairment. Res. Brief Ex. A.

(transcutaneous electrical nerve stimulation) unit for her leg pain. JE 6. Petitioner returned to Dr. Miller on August 13, 2020, for pain in her right knee bursa. She was assessed as having bursitis and given an injection in the right infrapatellar bursa. JE 2, pp. 12-15. On October 24, 2020, Ms. Rank reiterated that Petitioner's PTSD symptoms stemmed from her work injury. She also opined the condition was chronic and she should continue to receive outpatient services as part of her ongoing treatment. Pet. Ex. 2, p. 4.

Hearing was held before a Deputy Workers' Compensation Commissioner on December 21, 2020. The Deputy issued his Arbitration Decision on July 25, 2021. He stated there were three issues to be determined at hearing: (1) whether Petitioner's injury resulted in a permanent disability; (2) the extent of her entitlement to permanent partial disability benefits; and (3) whether Respondent was liable for a penalty under Iowa Code section 86.13. Arbitration Decision (Arb. Dec.), p. 1. The Deputy concluded Petitioner sustained PTDS as a sequela from her work injury to her lower extremities on April 1, 2015. However, he determined Ms. Rank's opinion that Petitioner's PTSD was "chronic" is not the equivalent to a finding of permanent impairment. He found there was no agency precedent or case law finding such, and no expert had given an opinion that Petitioner's PTSD was a permanent impairment or given her restrictions for such. *Id.* at 6. As such, the Deputy concluded Petitioner had not met her burden to prove the PTSD is a permanent disability and thus could not show she has an injury to the body as a whole. *Id.*

The Deputy further concluded both Dr. Pierotti's determination of no permanent impairment to either lower extremity and Dr. Delbridge's determination of 7% bilateral permanent impairment, were unconvincing. Arb. Dec. p. 6. More specifically, the Deputy

found Dr. Delbridge based his bilateral impairment rating "on a finding that [Petitioner] had a mild gait derangement." *Id.* The Deputy found that Table 17-5 of the Guides to Evaluation of Permanent Impairment indicates the 7% rating is only appropriate for a "gait derangement of a person who is dependent on an assistive device, or to those who have documented moderate to advanced arthritic changes of the hip, knee or ankle." *Id. See also* Res. Brief Ex. A. He determined Petitioner did not fit any of these criteria. *Id.* "Based on this issue" the Deputy found Dr. Delbridge's opinion regarding permanent impairment "not convincing." *Id.* Thus, he determined Dr. Field's opinion that Petitioner sustained a 5% permanent impairment to the right lower extremity and none to the left lower extremity to be most convincing. He awarded 11 weeks of permanent partial disability (PPD) based on such.

Finally, Petitioner provided the Deputy with her Exhibit 5, which showed approximately 77 weekly payments of temporary disability benefits from Respondent to Petitioner. All of the payments were late, the majority from eight to ten days late. The Deputy concluded there should be no penalty for the delay of payment of temporary benefits because most were made within 10 days after the end of the week. Arb. Dec., p. 9. However, he found a penalty of $1,042.03 for the delay of payment of PPD benefits for approximately one month was warranted. *Id.* The Deputy concluded Respondent waived the issue of costs of the IME report from Dr. Delbridge, but even if it had not Petitioner would be entitled to the costs of the IME under Iowa Code section 85.39 and thus awarded her the costs of the IME. *Id.*

Petitioner appealed and Respondent cross-appealed the decision of the Deputy. On February 7, 2022, the Commissioner issued his Appeal Decision. The Commissioner

performed a de novo review of the record and affirmed in part, reversed in part, and modified in part the Deputy's Arbitration Decision. The Commissioner concluded Petitioner proved she sustained PTSD as a sequela of the work injury. Appeal Decision (App. Dec.), p. 2. However, Ms. Rank and Dr, Mittauer only opined that Petitioner's PTSD is "chronic."

> Word choice matters in determining whether a condition is permanent, entitling [Petitioner] to permanent partial disability benefits under Iowa Code section 85.34. [Petitioner] did not follow up with Rank, Dr. Mittauer, the treating psychiatrist, or any other medical provider to ask whether [her] PTSD is, in fact, permanent. Based on my de novo review, I do not find any medial provider has opined [Petitioner's] PTSD is permanent. I affirm the deputy commissioner's finding [Petitioner] failed to meet her burden of proof that she sustained a permanent mental health condition caused by the work injury.

Id. at 3.

The Commissioner awarded Petitioner a penalty benefit of $200.00 for Respondent's delays of temporary total and temporary partial disability benefits, finding Respondent did not offer a reason for the delays. *Id.* at 4. He also awarded $1,100 for Respondent's delay of PPD benefits. *Id.* Thus, awarding Petitioner a total of $1,300 in penalty benefits. *Id.* at 4-5. The Commissioner found Respondent did not waive the issue of costs, but affirmed the Deputy's award of the cost of Dr. Delbridge's IME to Petitioner in the amount of $1,750, and awarded Petitioner $100 for the filing fee. *Id.* at 5. Finally, the Commissioner affirmed without further comment the award of 11 weeks of permanent partial disability benefits. *Id.* Thus, implicitly affirming the Deputy's determination of 5% PPD of the right lower extremity and no permanent disability on her left lower extremity.

On April 7, 2022, Petitioner filed her Petition for Judicial review with this Court. She first contends there is not substantial evidence to support the Commissioner's conclusion

that she had 5% PPD of her right lower extremity and none on her left lower extremity. *See* Iowa Code § 17A.19(10)(f). Petitioner argues the Deputy, and by summarily adopting the Deputy's Decision on this issue the Commissioner, erred in incorrectly reading the language of Dr. Delbridge's report. The opinion of Dr. Delbridge was then disregarded based on this erroneous reading by the agency.[2] Second, Petitioner argues the Commissioner erred in determining her PTSD is not permanent and that her compensation should instead be determined on the basis of industrial disability. She further contends even if it is determined she has not met her burden to show her PTSD is permanent, the Court should find she is still in a healing period for this condition. Finally, Petitioner contends the Commissioner erred in the amount of penalty assessed for the late payment of temporary total and partial disability benefits because Respondent did not offer any reasonable basis for its delay. Thus, the award does meet the standard or mandate of the law under Iowa Code section 86.13(4).

II. SCOPE AND STANDARD OF REVIEW.

The Iowa Administrative Procedure Act, Iowa Code chapter 17A, governs the scope of this Court's review in workers' compensation cases. Iowa Code § 86.26 (2018); *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). "Under the Act, we may only interfere with the commissioner's decision if it is erroneous under one of the grounds enumerated in the statute, and a party's substantial rights have been prejudiced." *Meyer*, 710 N.W.2d at 218. A party challenging agency action bears the burden of demonstrating

[2] The Court notes Petitioner also argues in the alternative that Dr. Delbridge's rating of 7% to her right lower extremity should be combined with Dr. Field's 5% rating of the same. However, this issue was not raised or addressed by the agency. In contested cases the Court's review is generally limited to those questions considered by the administrative agency. *General Tel. Co. v. Iowa State Commerce Comm'n*, 275 N.W.2d 364, 367 (Iowa 1979). Accordingly, the Court cannot and will not address this issue that is raised for the first time on judicial review.

the action's invalidity and resulting prejudice. Iowa Code § 17A.19(8)(a). This can be shown in a number of ways, including proof the action was ultra vires; legally erroneous; unsupported by substantial evidence in the record when that record is viewed as a whole; or otherwise unreasonable, arbitrary, capricious, or an abuse of discretion. *See id.* § 17A.19(10). The district court acts in an appellate capacity to correct errors of law on the part of the agency. *Grundmeyer v. Weyerhaeuser Co.*, 649 N.W.2d 744, 748 (Iowa 2002).

> If the claim of error lies with the agency's findings of *fact,* the proper question on review is whether substantial evidence supports those findings of fact. If the findings of fact are not challenged, but the claim of error lies with the agency's interpretation of the *law,* the question on review is whether the agency's interpretation was erroneous, and we may substitute our interpretation for the agency's.

Meyer, 710 N.W.2d at 219 (citations omitted).

Factual findings regarding the award of workers' compensation benefits are within the Commissioner's discretion, so the Court is bound by the Commissioner's findings of fact if they are supported by substantial evidence. *Clark v. Vicorp Rest., Inc.,* 696 N.W.2d 596, 604 (Iowa 2005). Substantial evidence is defined as evidence of the quality and quantity "that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance." Iowa Code § 17A.19(10)(f)(1). "The workers' compensation law should be liberally construed to accomplish the object and purpose of the legislation: to benefit the worker and his dependents." *Dillinger v. City of Sioux City*, 368 N.W.2d 176, 180 (Iowa 1985).

III. MERITS.

A. Lower Extremity Impairment.

The agency, as the fact finder, determines the weight to be given to any expert

testimony. *Sherman v. Pella Corp.*, 576 N.W.2d 312, 321 (Iowa 1998); *Dodd v. Fleetguard, Inc.*, 759 N.W.2d 133, 138 (Iowa Ct. App. 2008). Such weight depends on the accuracy of the facts relied upon by the expert and other surrounding circumstances. *Id.* The Commissioner may accept or reject the expert opinion in whole or in part. *Sherman,* 576 N.W.2d at 321.

> Making a determination as to whether evidence "trumps" other evidence or whether one piece of evidence is "qualitatively weaker" than another piece of evidence is not an assessment for the district court or the court of appeals to make when it conducts a substantial evidence review of an agency decision.

Arndt v. City of Le Claire, 728 N.W.2d 389, 394 (Iowa 2007).

As quoted above, Dr. Delbridge found Petitioner had a 7% impairment in her left lower extremity due to at most 10 degrees flexion and the *same impairment* on her right due to 0 degrees flexion. Pet. Ex. 1, p. 6. He also found she had a gait derangement. *Id.* He then went on to find the 7% impairment on the right lower extremity could not be included because having a gait derangement precludes inclusion of such impairment, and instead the gait derangement resulted in a 7% whole person impairment based on Table 17-5. Thus, he ultimately concluded regarding permanency that Petitioner has 7% whole-person impairment based on the gait derangement and 7% impairment of her left lower extremity. The Agency concluded, and both parties agree, Petitioner does not use any assistive device nor does she have any arthritic changes as required for the 7% whole-body impairment under Table 17-5. As such, it is undisputed that the record does not support Dr. Delbridge's conclusion that she has a gait derangement leading to a whole-body impairment under Table 17-5.

The Agency concluded that Dr. Delbridge's determination Petitioner had a 7%

permanent impairment on both lower extremities was "based on a finding that [Petitioner] had a mild gait derangement." Arb. Dec., p. 6.[3] Then it determined that based on the fact Dr. Delbridge was incorrect about the use of Table 17-5 because Petitioner did not use any assistive devices or suffer from arthritis, his opinion regarding permanent impairment was not convincing. *Id.* The Court concludes the agency's reading of Dr. Delbridge's report was erroneous. The clear and express language of Dr. Delbridge's report shows he did not base his determination that Petitioner had a 7% impairment in both lower extremities on his further finding that she had a gait derangement. He first found she had 7% in the left lower due to at most 10 degrees dorsiflexion, then 7% of the right lower based on zero dorsiflexion. This was separate from his further finding that she also had a gait derangement, based on which he determined he could not include the right lower extremity impairment and instead should find 7% whole body impairment under Table 17-5. It is undisputed Dr. Delbridge's opinion was incorrect in this regard. The Court concludes the Agency did not disregard Dr. Delbridge's opinion due to his incorrect application of Table 17-5, but solely on its erroneously interpretation that his conclusion of impairment to both lower extremities was based on his determination of gait derangement. This was in error because Dr. Delbridge did not base his bilateral disability determination on the gait derangement.

The Court concludes there is not substantial evidence in the record to support the Agency's determination that Dr. Delbridge based his finding of 7% impairment to both

[3] It is reiterated that the Commissioner did not specifically address Petitioner's issue on appeal relating to the determination by the Deputy on her lower extremity impairment determination. Instead, without further comment the Commissioner summarily affirmed this determination by affirming the 11 weeks of permanent partial disability benefits which was based on 5% impairment for 220 weeks. Arb. Dec., p. 7; App. Dec., pp. 1, 5.

lower extremities on his determination that Petitioner had a gait derangement. As such, there is not substantial evidence to support and the Agency's determination that Dr. Delbridge's opinion was unconvincing based on its erroneous interpretation of his report. The Court remands this issue for the Commissioner to give Dr. Delbridge's report the correct reading in accordance with this Court's ruling, determine anew the weight the report should be given based on this corrected reading, and based on this weight determine the appropriate permanent impairment rating for Petitioner's right and left lower extremities.

B. PTSD Permanency.

The Commissioner determined Petitioner met her burden to prove she sustained PTSD as a sequela of her April 15, 2015 work injury, but did not meet her burden to show it was permanent in order to receive industrial disability. App. Dec., p. 2. Her treating psychiatrist, Dr, Mittauer, diagnosed her with chronic PTSD as did Ms. Rank. JE 4, p. 25; Pet. Ex. 2, p. 4. The Commissioner concluded "word choice matters in determining whether a condition is permanent" and thus entitling Petitioner to permanent partial disability benefits. App. Dec., p. 3. He concluded that Petitioner did not meet her burden to prove she sustained a permanent mental health condition because no medical provider has ever opined her PTSD is permanent and she has never received any work restrictions based on such. Petitioner contends the Commissioner erred in concluding she failed to meet her burden to show a permanent mental injury.

In support of her argument, Petitioner points to *Sandberg v. Rubbermaid Home Products,* File No. 5011708, 2006 WL 2706136, at *6 (Arb. Dec. Aug. 31, 2006), wherein the then-Commissioner concluded, "If the chronic pain is permanent, the depression is

permanent, although it may vary in intensity from day to day with the varying level of pain each day." However, Petitioner fails to point out the fact that on judicial review the district court concluded that "even though substantial evidence supported the agency finding of permanent depression, given that the agency also found that the depression did not result in work restrictions, the depression could not serve as a basis for a finding of industrial disability." *Sandberg v. Rubbermaid Home Prod.,* 760 N.W.2d 210 (Table), 2008 WL 5234378, at *3 (Iowa Ct. App. Dec. 17, 2008). The Iowa Court of Appeals affirmed the district court on appeal, noting the agency "did not find industrial disability based on . . . depression" because the agency found her mental depression was not a cause of restrictions to date. *Id.* at *4. Accordingly, *Sandberg* actually supports the Commissioner's determination here, namely that because the PTSD did not result in any permanent work restrictions it could not serve as a basis for a finding of permanent impairment and thus industrial disability.

Accordingly, the Court concludes that because no medical provider has opined Petitioner's PTSD is permanent, that she suffered a permanent impairment based on such, or imposed any work restrictions based on the PTSD, there is substantial evidence in the record to support the Commissioner's determination Petitioner has not met her burden to show a permanent mental injury.

In the alternative, Petitioner argues that if it is determined she has not met her burden to show her PTSD is permanent then the Court should conclude she is still in a healing period for this condition. However, Petitioner never made this argument at the agency level and as such the Commissioner could not rule on it. The Court's appellate jurisdiction in this matter limits it to addressing only such arguments as were raised and

addressed by the agency. In contested cases the Court's review is generally limited to those questions considered by the administrative agency. *General Tel. Co. v. Iowa State Commerce Comm'n*, 275 N.W.2d 364, 367 (Iowa 1979).

> [A]n appellate court will consider only such questions as were raised and reserved in the lower court. The same principle . . . applies on review by courts of determinations of administrative agencies so as to preclude from consideration questions or issues which were not properly raised in the proceedings before the agency.

Chicago and Northwestern Transp. v. Iowa Transp. Regulation Bd., 322 N.W.2d 273, 276 (Iowa 1982) (quoting 2 Am.Jur.2d *Administrative Law* § 724, at 624 (1962) (footnotes omitted)). A party is precluded from raising issues in the district court that were not raised and litigated before the agency. *Interstate Power Co. v. Iowa State Commerce Comm'n*, 463 N.W.2d 699, 701 (Iowa 1990). It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the lower tribunal before they can be decided on appeal. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). A failure to properly preserve an issue leaves nothing for the appellate court to review. Our error preservation rules serve the salutary purpose of giving notice to the court and opposing counsel what is being challenged. *State v. McCright,* 569 N.W.2d 605, 608 (Iowa 1997). Accordingly, because this issue was not raised and adjudicated at the agency level, such issue is not properly before this Court and cannot be addressed by it here.

C. Penalty Benefits.

Finally, Petitioner contends the Commissioner erred in only awarding her $200.00 for the delay by Respondent of every one of her temporary partial and total disability payments. The Commissioner may award a penalty on benefits for that were unreasonably delayed or denied. Iowa Code § 86.13. The Code provides,

> If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.

Iowa Code § 86.13(4)(a). To receive a penalty benefit award under section 86.13, the petitioner must first establish a delay in the payment of benefits. *Keystone Nursing Care Ctr. v. Craddock,* 705 N.W.2d 299, 307 (Iowa 2005). The burden then shifts to the employer to prove a reasonable cause or excuse for the delay. *Schadendorf v. Snap-On Tools Corp.*, 757 N.W.2d 330, 334-35 (Iowa 2008). The Commissioner "shall award benefits under this subsection" if the employee has demonstrated a delay in payment and the employer failed to prove a "reasonable or probable cause or excuse for the . . . delay in payment." Iowa Code § 86.13(4)(b). "The application of the penalty provision does not turn on the length of the delay in making the correct compensation payment. Any delay without reasonable excuse entitles the employee to benefits in some amount." *Robbennolt v. Snap-On Tools Corp.*, 555 N.W.2d 229, 236-37 (Iowa 1996) (citing *Christensen v. Snap–On Tools Corp.,* 554 N.W.2d 254, 260, 261 (Iowa 1996)). "In the absence of a reasonable excuse for a delay, penalty benefits are mandatory. Only the amount is within the discretion of the commissioner." *Christensen,* 554 N.W.2d at 261. The purpose or goal of the statute is to punish and deter the employer from delaying payments. *Robbennolt,* 555 N.W.2d at 237. Benefits must be paid beginning the eleventh day after the injury and "each week thereafter during the period which compensation is payable, and if not paid when due," interest will be imposed. Iowa Code § 85.30. "If the required weekly compensation is timely paid at the end of the compensation week, no

interest will be imposed . . . . As an example, if Monday is the first day of the compensation week, full payment of the weekly compensation is due the following Monday." *Robbennolt,* 555 N.W.2d at 235.

Here, the Deputy did not award any penalty benefits despite the fact Petitioner showed in Exhibit 5 that all of her 77 weekly payments of temporary total and temporary partial benefits from Respondent were delayed and Respondent did not offer any excuse for the delay. The Deputy found that because most were paid withing 10 days a penalty was not appropriate. If the Court were reviewing the Deputy's Decision it would conclude this was clearly an error or law. In *Christensen,* the Iowa Supreme Court made clear two things relevant to the case at hand. *Christensen,* 554 N.W.2d at 260. First, although a delay of eleven days "may seem minimal to [the employer], it may not be minor to an employee relying on disability benefits to pay bills." *Id.* Second, "[m]ore importantly and contrary to the commissioner's decision, the applicability of section 86.13 does not turn on the length of the delay. Any delay without a reasonable excuse entitles the employee to penalty benefits in some amount." *Id.* The court there held that the Commissioner's determination that the "length of time involved does not warrant imposition of a penalty" was in error. *Id.* at 260-61. Accordingly, the Court concludes that because there was clearly a delay and Respondent provided no reason or excuse for such delay the Deputy was required to order mandatory penalty benefits and was in error for not doing so. It was an error of law to consider the length of the delay and not order penalty benefits.

The Commissioner here, in the final agency action that the Court *is* reviewing, concluded:

> The deputy commissioner found most of the temporary total and temporary partial disability benefits were made within 10 days after the end of the week

> when due and the deputy commissioner declined to award penalty benefits. The record reflects [Respondent] made 77 weekly payments of temporary disability benefits to [Petitioner], the majority of which were paid within 10 days. The record also reflects three payments were made within 17 days. [Respondent] did not offer a reason for the delays. Based on my de novo review, I find an award of $200.00 in penalty benefits is appropriate in this case.

App. Dec., p. 4. The Court concludes the Commissioner was correct in holding that Respondent did not offer any reason for the delays. However, it is unclear from the Commissioner's ruling whether he awarded the $200.00 penalty benefits for the delay of all 77 weeks of temporary total and partial benefits, or just for the three payments that were 17 days late and affirmed the Deputy's erroneous determination that the other delayed payments did not warrant penalty benefits. As set forth above, "In the absence of a reasonable excuse for a delay, penalty benefits are mandatory. Only the amount is within the discretion of the commissioner." *Christensen,* 554 N.W.2d at 261. Thus, if the Commissioner meant the payments that were 10 days or less delayed did not warrant penalty benefits than he erred in the same way as the Deputy. It is reiterated, the "application of the penalty provision does not turn on the length of the delay in making the correct compensation payment. Any delay without reasonable excuse entitles the employee to benefits in some amount." *Robbennolt*, 555 N.W.2d at 236-37. Accordingly, the Court must remand this issue to the Commissioner to clarify or correct his award of penalty benefits for Respondent's 77 weeks of delays in providing Petitioner her temporary total and partial disability benefits without offering any excuse for such delays.

IV. CONCLUSION.

For all the reasons set forth above, the Court concludes there is not substantial evidence in the record to support the Agency's determination that Dr. Delbridge based

his finding of 7% impairment to both lower extremities on his determination that Petitioner had a gait derangement due to its erroneous reading of Dr. Delbridge's medical report. As such this issue must be remanded to the Commissioner to give Dr. Delbridge's opinion the correct reading in accordance with this Court's ruling, determine anew the weight the report should be given based on this correct reading, and based on such weight then determine the appropriate permanent impairment rating for Petitioner's right and left lower extremities. The Court further concludes there is substantial evidence in the record to support the Commissioner's determination that Petitioner has not met her burden to show a permanent mental injury. Finally, the Court concludes the Commissioner's determination with regard to penalty benefits for the delay of Petitioner's temporary disability benefits must be remanded for clarification or correction. Accordingly, Petitioner's Petition for Judicial Review is **GRANTED IN PART, DENIED IN PART, AND REMANDED WITH INSTRUCTIONS.**

State of Iowa Courts

Case Number	**Case Title**
CVCV063437	CINDY FREIBURGER VS JOHN DEERE DUBUQUE WORKS
Type:	OTHER ORDER

So Ordered

Celene Gogerty, District Judge
Fifth Judicial District of Iowa

Electronically signed on 2022-10-31 14:35:51